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James M. Talley Jr.

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effect of the decision is, perhaps, best summed up by Justice Black, who, in a dissent, states: "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not."³¹ The problem is further complicated in North Carolina due to the fact that the court on rehearing the *Allen* case did not refer to the constitutional issues in its opinion. In any event, the court was equally divided and, therefore, the holding of the case, whatever it may be, is not precedent for future litigation.

JERRY W. AMOS
Associate Editor

Torts—Judicial Abrogation of the Doctrine of Municipal Immunity to Tort Liability

In *Holytz v. City of Milwaukee*¹ an action was brought by a three-and-one-half year old infant against the defendant municipality for injuries sustained when a steel trap door, covering a water meter pit, fell on her hands. An action was also brought by the infant's father to recover for medical expenses incurred by him as a result of his child's injuries, and for damages due to loss of her society and companionship. The injuries occurred while the infant was using a playground maintained by the defendant for pre-school aged children. It was alleged that the employees of the defendant had negligently allowed the trap door to remain open.

The Wisconsin Supreme Court, reversing the trial court which had sustained the defendant's demurrer, held that the municipality was not immune from liability for its negligent torts. In so holding, Wisconsin joined at least four other states² which have abolished by

continuing its grant, to him of the *special privilege* . . . of practicing law in the State." *Id.* at 865. Two members agreed that the powers conferred on the bar violated both the first and fourteenth amendments. Finally, a plurality of four members refused to consider the constitutional issues. *Cf.*, *United States v. CIO*, 335 U.S. 106 (1948) and *United States v. International Union UAW*, 352 U.S. 567 (1957) construing 18 U.S.C. § 610 which prohibits any corporation or labor organization from making "a contribution or expenditure in connection with any election to any political office . . ."

³¹ 367 U.S. at 865.

¹ 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

² *California*, see *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (Sup. Ct. 1961); *Florida*, see *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Illinois*, see *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Michigan*, see *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961).

judicial decision the time-honored and deeply engrained doctrine of municipal immunity to tort liability.³

While the basic principle of governmental immunity is founded on the English concept that the sovereign can do no wrong,⁴ the judicial basis of municipal immunity from tort claims can be traced to the English case of *Russel v. Men of Devon*.⁵ In that case an unincorporated county was relieved of liability for damages which were caused by the disrepair of a bridge. As one of the reasons for its decision, the court stated that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience."⁶

There is probably no tenet in our law that has been more universally berated by courts⁷ and legal writers⁸ than the governmental immunity doctrine. The criticisms are wide-ranging and highly varied. Some common examples are: that it is unfair to impose upon the individual the burden of his damage, rather than upon the entire community where it justly belongs;⁹ that by denying a remedy for a wrong, the doctrine results in the deprivation of life, liberty, and property without due process of law;¹⁰ and that the doctrine runs counter to a basic concept underlying the law of torts, that is, that liability follows negligence.¹¹

Why has a rule been adhered to so consistently and with so few exceptions in the face of virtually unanimous criticism? The answer to this question is embedded in the traditions of the Anglo-American philosophy of the common law and the doctrine of stare decisis.

³ For other notes dealing with the general subject of municipal immunity from tort liability see Notes, 4 N.C.L. Rev. 136 (1926), 12 N.C.L. Rev. 172 (1934), and 36 N.C.L. Rev. 97 (1957).

⁴ See Borchard, *Government Liability in Torts*, 34 YALE L.J. 1, 4 (1924).

⁵ 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788). There is some argument that this case relied upon an earlier authority from Brookes Abr., but most historical analyses agree that *Men of Devon* is the common law basis of municipal tort immunity. See 17 Wis. 2d at —, 115 N.W.2d at 620.

⁶ *Id.* at 673, 100 Eng. Rep. at 362. Another ground advanced by the court for allowing immunity was that the defendant was an unincorporated county and did not have funds to pay damages.

⁷ See, e.g., *Fowler v. City of Cleveland*, 100 Ohio St. 158, 176, 126 N.E. 72, 77 (1919).

⁸ See, e.g., Casner & Fuller, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).

⁹ *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943).

¹⁰ *Liber v. Flor*, 143 Colo. 205, 209, 353 P.2d 590, 593 (1960) (dissenting opinion).

¹¹ *Molitor v. Kaneland Community Unit Dist.* No. 302, 18 Ill. 2d 11, 20, 163 N.E.2d 89, 93 (1959).

Invariably, in the opinions of the courts upholding the rule of municipal immunity, one will find a statement to the effect that the overruling of such a well-established doctrine is a policy question which should be directed to the legislature and not the court.¹² There are numerous areas of the law, however, where the courts have overruled long-standing common-law doctrines. Most analogous to the subject under discussion is the judicial abolition of tort immunity of charitable institutions.¹³ The right of the child to recover from a third party for alienation of affection and disruption of the family circle,¹⁴ the recognition of the right of privacy,¹⁵ and the right of contribution between or among negligent tortfeasors¹⁶ similarly illustrate areas of the common law which the courts have chosen to change, despite the demands of stare decisis.¹⁷

The seemingly invincible barrier to judicial abrogation of municipal tort immunity was first broken in the Florida case of *Hargrove v. Town of Cocoa Beach*.¹⁸ Subsequently, at least four other jurisdictions,¹⁹ including Wisconsin, have joined what now

¹² See, e.g., *Howard v. Tocomo School Dist. No. 10*, 88 Wash. 167, 152 Pac. 1004 (1915), where the court stated that the doctrine had become fixed as a matter of public policy, and regardless of the reason upon which the rule was made to rest, any change had to come from the legislature. See also *Nelson v. Maine Turnpike Authority*, 157 Me. 174, 170 A.2d 687 (1961); *Maffie v. Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959).

¹³ See, e.g., *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1958), where the court, in overruling the doctrine, said that it is a judicial responsibility to conform to modern concepts and needs, and when judges of a later generation reach contrary conclusions with those of an earlier generation, they must take the necessary corrective action. But see *Knecht v. St. Mary's Hosp.*, 392 Pa. 75, 140 A.2d 30 (1958), where the court refused to overrule the doctrine even though judge-made, because it was firmly fixed in the law of the state, and, therefore, should be abrogated only by the legislature.

¹⁴ See, e.g., *Miller v. Monsen*, 228 Minn. 400, 37 N.W.2d 543 (1949), where recovery was allowed. But see *Henson v. Thomas*, 231 N.C. 173, 56 S.E.2d 432 (1949), where recovery was refused.

¹⁵ See, e.g., *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905), where the court recognized the right. But see *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955), where it was held that such right should be provided by the legislature and not by the court.

¹⁶ See, e.g., *Knell v. Felton*, 174 F.2d 662 (D.D.C. 1949), allowing contribution between negligent tortfeasors. But see *Fidelity & Cas. Co. v. Chapman*, 167 Ore. 661, 120 P.2d 223 (1941), following the common-law rule of no contribution in the absence of a statute.

¹⁷ Generally speaking, the one field in which the courts adhere strictly to the doctrine of stare decisis is that of real property, where stability is felt to be a necessity in order to protect vested rights. See, e.g., *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1011 (1893).

¹⁸ 96 So. 2d 130 (Fla. 1957).

¹⁹ California, Illinois, Michigan, and Wisconsin.

appears to be a definite trend. In overruling this well-established common-law rule, these courts were faced with similar obstacles: First, in all five jurisdictions, as in the great majority of jurisdictions in the United States, the common law had been adopted as the law of the state either by statute²⁰ or by constitutional provision.²¹ Thus, the question arose as to whether the courts were invading the province of the legislature when they attempted to abolish a particular common-law rule. In two of the cases²² specific reference was made to this question, but both courts emphatically rejected it as being an obstruction to the discarding of an unjust rule that the courts themselves had created.²³

The existence of legislative enactments²⁴ waiving the immunity in certain specific circumstances presented another formidable problem. Once again, proponents of the immunity rule argued that the legislature had pre-empted the field and that judicial action was forbidden. Two cases²⁵ dealt expressly with this point, but neither accepted it as grounds for retention of the rule. One court reasoned that the series of statutes created a trend toward full abrogation which the court carried to its ultimate,²⁶ while the other simply visualized them as sporadic efforts to relieve the harshness of the rule, rather than as comprehensive legislation designed to cover the field.²⁷

The extent to which the abrogation of the doctrine would apply in the future presented additional problems. The court in the principal case attempted to anticipate and to resolve these issues. First, the court extended the abolition only to harms which are torts, and no

²⁰ *E.g.*, CAL. CIV. CODE § 5.

²¹ *E.g.*, WIS. CONST. art. 14, § 13.

²² *Williams v. City of Detroit*, 364 Mich. 231, 255, 111 N.W.2d 1, 23; *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, —, 115 N.W.2d 618, 624 (1962).

²³ In *Holytz v. City of Milwaukee*, *supra* note 22, the Wisconsin court in disallowing this argument stated: "The doctrine of governmental immunity having been engrafted upon the law of the state by judicial provision, we deem that it may be changed or abrogated by judicial provision."

²⁴ *E.g.*, in California: CAL. ED. CODE § 903 (liability of school district for negligence of employees); CAL. GOV. CODE § 50140 (public agency liability for damage by mobs); CAL. GOV. CODE § 53051 (public agency liability for dangerous or defective condition of public property); CAL. VEH. CODE § 17001 (public agency liability for negligent operation of motor vehicles).

²⁵ *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 218, 11 Cal. Rptr. 89, 93, 359 P.2d 457, 461 (Sup. Ct. 1961); *Williams v. City of Detroit*, 364 Mich. 231, 253, 111 N.W.2d 1, 22 (1961).

²⁶ *Williams v. City of Detroit*, *supra* note 25.

²⁷ *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 218, 11 Cal. Rptr. 89, 93, 359 P.2d 457, 461 (Sup. Ct. 1961).

liability was imposed upon municipalities in the exercise of their legislative, quasi-legislative or quasi-judicial capacities. However, the abolition was not limited to acts of commission but was made to apply broadly to all torts, including those of omission.²⁸ Although the principal case related specifically to a city, the court considered the abrogation to encompass all public bodies—the state, counties, cities, villages, towns, school districts, and all other political subdivisions of the state—whether they be incorporated or not. Finally, the effective date of the decision was set some forty days after the rendering of the opinion, in order to give governmental units the opportunity to make financial arrangements to meet the new liability implicit in the holding. However, the ruling was made to apply to the principal case so as to prevent the announcement of the new rule from being dictum, and further, to give the plaintiffs the benefit of their efforts and expenditures in challenging the old rule.

No doubt, in the near future the North Carolina Supreme Court will be afforded the opportunity to abolish judicially the rule of municipal tort immunity. If the court should decide to follow the trend set by the above-mentioned cases, it will be faced with the same problems as to judicial abolition of the rule. North Carolina has, by a reception statute,²⁹ expressly declared that the common law is in full force in the state, thus presenting the problem of whether or not this deprives the court of the power to alter the rule. In the past the North Carolina court has, in numerous cases, steadfastly refused to abolish many common-law doctrines.³⁰ As the court made no specific reference to the reception statute in these cases, it is impossible to determine if this was a factor in its decision. However, these decisions are significant in that they illustrate the court's reluctance to overrule deeply engrained common-law rules.

The North Carolina Supreme Court will also be faced with pre-

²⁸ At least one court limited the abrogation to acts of commission. *McAndrew v. Mularchuck*, 33 N.J. 172, 162 A.2d 820 (1960).

²⁹ N.C. GEN. STAT. § 4-1 (1953).

³⁰ *E.g.*, *Redding v. Redding*, 235 N.C. 638, 70 S.E.2d 676 (1952), upholding rule of no recovery by unemancipated child in suit against parents for negligent torts; *Elliot v. Elliot*, 235 N.C. 153, 69 S.E.2d 224 (1952), upholding rule that the obligation of father to support minor child is not a property right but is a personal duty terminated by death of father; *Sholten v. Sholten*, 230 N.C. 149, 52 S.E.2d 350 (1949), upholding rule of no recovery by husband for loss of consortium; *Rabb v. Covington*, 215 N.C. 572, 2 S.E.2d 705 (1939), upholding rule of implied warranty in sale of food by retailer to consumer.

existing legislation on the subject, which will require a decision as to whether this is indicative of the extent of abrogation desired by the legislature. The North Carolina Tort Claims Act³¹ in one fell swoop abolished the defense of governmental immunity for "negligent acts"³² in suits against state agencies and employees.³³ In addition, there are several other statutes that waive the defense of immunity in certain instances.³⁴ On the basis of these statutes the court might well hold that the legislature has indicated the extent of abrogation desired by it, thus precluding judicial invasion of this field. But the line of reasoning adopted by those courts which have overruled the doctrine offers a sound solution to problems entailed in the judicial repudiation of municipal tort immunity, and it is believed that North Carolina, by following this line, can rid itself of an unjust and anachronistic rule of law.³⁵

JAMES M. TALLEY, JR.

³¹ N.C. GEN. STAT. § 143-291 (1958). This statute is commented upon in *A Survey of Statutory Changes in North Carolina in 1951*, 29 N.C.L. REV. 351, 416 (1951).

³² The term "negligent torts" has been interpreted by the North Carolina Supreme Court as including only acts of commission. See, e.g., *Flynn v. State Highway Comm'n*, 244 N.C. 617, 94 S.E.2d 571 (1956), discussed in Note, 36 N.C.L. REV. 352 (1958).

³³ A few other states have a similar statute, but only in New York has it been construed to waive immunity as to all state agencies and political subdivisions, including municipalities. N.Y. CT. CL. ACT § 8. In *Bernadine v. City of New York*, 182 Misc. 609 (Sup. Ct. 1943), *rev'd*, 268 App. Div. 444, 51 N.Y.S.2d 888 (1st Dept. 1944), *aff'd*, 294 N.Y. 361, 62 N.E.2d 604 (1945), the court in construing the act held that the civil divisions of the state were answerable equally with individuals and private corporations for wrongs of officers and employees, since the act waived the state's immunity, and the legal irresponsibility previously enjoyed by these governmental units was nothing more than an extension of the exemption of liability that the state had possessed. In *Turner v. Gastonia City Bd. of Educ.*, 250 N.C. 456, 109 S.E.2d 211 (1959), the North Carolina court held the act not applicable to employees of local units, such as city and county boards of education, because they are not employees of the state.

³⁴ E.g., N.C. GEN. STAT. § 115-53 (Supp. 1961), waiver of governmental immunity by city and county boards of education by securing liability insurance; N.C. GEN. STAT. § 143-300.1 (1958), Industrial Commission to hear tort claims arising out of negligence of driver of school bus or school transportation service vehicle, when salary is paid out of State Nine Months School Fund; N.C. GEN. STAT. § 160-54 (1952), duty of governing authorities of municipality to keep streets and bridges in proper repair, governmental immunity being no defense; N.C. GEN. STAT. § 160-191.1 (1952), waiver of governmental immunity by municipality for negligent operation of motor vehicles by securing liability insurance, waiver being only to extent of amount of insurance so obtained. This last statute is commented upon in *A Survey of Statutory Changes in North Carolina in 1951*, 29 N.C.L. REV. 351, 421 (1951).

³⁵ The oft-quoted statement made by the Washington court in overruling